BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,552

ISLAND AIRLINES, INCORPORATED, Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE CIVIL AERONAUTICS BOARD

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BRIEF FOR THE RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the order here involved rested on Section 416(b) of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301, et seq.). The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act, (49 U.S.C. 1486) which provides for the filing of a petition for review within 60 days after entry of the Board's order. The Board's order was entered on October 11, 1965, and the petition for review was filed on November 23, 1965.

COUNTERSTATEMENT OF THE CASE

Island Airlines, Inc. seeks review of an order of the Civil Aeronautics Board (R. 167) denying Island's request that it and all "others similarly situated" (R. 2) be exempt from economic regulation under the Federal Aviation Act with respect to air operations between the Hawaiian Islands. Island's proposal was that the Board surrender jurisdiction to the State of Hawaii to license and regulate those carriers engaged in

the transportation of persons and property between the islands. The application was filed on May 25, 1965, during the pendency before this Court of Island's appeal from the decision of the district court permanently enjoining it from operating without a certificate of convenience and necessity from the Board (235 F.Supp. 990), and was denied two weeks before this Court's affirmance of the district court decree. Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735.[1/]

As this Court is aware, the Federal Aviation Act establishes a pervasive system of regulation for air transportation, and vests exclusive regulatory jurisdiction in the Board over that transportation which falls within its coverage. Transportation between the Hawaiian Islands is subject to Federal control because the statute embraces (Section 101(10), 101(21), infra, p. 29) all carriage of mail by aircraft and "the carriage by aircraft of persons or property as a common carrier . . . between places in the same State of the United States through the airspace over any place outside thereof . . .." Furthermore the Act requires that any person desiring to engage in air transportati must first obtain a certificate of public convenience and necessity iss by the Board after notice and hearing and upon proof that the proposed transportation is required by the public convenience and necessity and that the applicant is qualified to perform it properly (Section 401(a), infra, p. 30) Carriers whose certificates authorize the transportatio

1/ Island did not file a petition for certiorari to review this decision.

of mail may be granted subsidy for the support of their mail, passenger and property operations (Section 406(b), infra, p. 31). The statute also contains an exemption provision (Section 416, 49 U.S.C. 1376, infra, p. 32) which permits the Board to exempt any carrier or class of carriers from the economic regulatory provisions, including the requirement that a certificate of public convenience and necessity be obtained as a prerequisite to operations.[2/] Pursuant to these various provisions, there are two carriers holding certificates from the Board which provide regular route operations between the islands and which receive subsidy support (Aloha Airlines, Inc. and Hawaiian Airlines, Inc.), and numerous carriers operating small aircraft between the islands pursuant to a blanket exemption regulation (14 C.F.R. 298) which permits certain "air taxi" operations.[3/]

2/ To grant exemption, the Board must find that enforcement of the statutory provision (here, the one that a certificate be obtained) would result in "undue burden" or hardship on the carrier, and that exemption is in the "public interest."

3/ Generally speaking, certificates issues pursuant to Section 401 are required before regular route operations may be conducted with large transport aircraft. Hawaiian's original certificate was issued pursuant to the "grandfather" provisions of the Civil Aeronautics Act of 1938 (52 Stat. 987), and Aloha's certificate after proof of public convenience and necessity in 1948.

The "air taxi" regulation permits operations only with aircraft of less than 12,500 pounds gross takeoff weight, and any person desiring to do so may avail himself of the benefit of Part 298. Island proposes to operate with large transport-type aircraft, a type of service not permitted by Part 298.

The history of Island's attempt to establish that the Federal Aviation Act has no application to interisland operations except for the transportation of mail is familiar to the Court and need not be recounted here. For present purposes, it may be stated that Island's contentions in the prior litigation were not confined to the technical question of whether the channel waters between the islands are "high seas", with the consequence that operations between them involves passage "through the airspace over any place outside" the state. On the contrary, Island urged that even if the waters between the islands were outside the state's boundaries, the statute nonetheless should be held inapplicable because Congress could not have intended that the "any place" provision be applied to subject "local transportation" between the islands to Federal control,[4] and that such transportation was so much a matter of local concern and Hawaii's position so unique that the statute could not be constitutionally construed to vest jurisdiction in the Board. Additionally, it was contended that the state and Island had been discriminated against in various respects, and that there was no basis for any determination that operations by Island would inflict adverse competitive impact on the federally subsidized carriers Aloha and Hawaiian.[5] Notwithstanding Island's position, these various

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4/ This was in fact the basis of the decision of the Hawaiian Supreme Court in holding that the state commission, rather than the Board, possessed jurisdiction. Application of Island Airlines, Inc., 47 Haw. 1, 384 P.2d 536 (1963).

5/ See, e.g., twelve errors asserted before this Court in the appeal from the District Court injunction (352 F.2d at p. 736).
(footnote continued)

contentions were rejected.

Thus, the District Court found that all of the major islands were separated by open seas which were outside the State's boundaries, and that the legislative history of the Statehood Act established that Congress intended operations over these waters to fall within the definition of interstate air transportation and to remain subject to economic regulation by the Board. It rejected Island's contention that,

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They included:

"6. The Court below erred in failing to hold that either the Public Utilities Commission of the State of Hawaii or the State of Hawaii itself was an indispensable party to the action.

"7. The Court below erred in not dismissing the complaint upon the grounds that the Supreme Court of the United States is vested with original jurisdiction of actions to which a state is an indispensable party.

* * * * *

"9. The Court below erred in not holding that appellee's construction and application of the Federal Aviation Act resulted in unconstitutional and invidious discrimination against Hawaii, her people and appellant.

"10. The Court below erred in failing to hold that appellee was invidiously discriminating against Hawaii by attempting to enjoin appellant's flights on the basis of instrument clearances requiring it to fly to sea while not applying the same rule against California intrastate carriers, or alternatively, that appellee's conduct was (a) unjust and inequitable and constituted 'unclean hands,' or (b) showed such flights to be 'de minimis' and hence no basis for injunctive relief, or (c) constituted an administrative interpretation of the Federal Aviation Act showing such flights did not constitute a basis for federal jurisdiction.

"11. The Court below erred in finding that appellant's operations would result in a decrease in intervenors' revenues and an increase in their subsidy need without there being testimony in the record by witnesses on the stand and subject to cross-examination."

as thus construed, the Federal Aviation Act was unconstitutional. In view of the impact of Island's operations upon Hawaiian and Aloha, the court held that "to deny CAB jurisdiction would substantially interfere with the execution of aims and objectives of the Act", and thus "that Island's interisland flights are not a matter of purely local interest and concern." Accordingly, it issued a permanent injunction restraining Island from the carriage by aircraft of persons or property as a common carrier for compensation or hire in commerce, or engaging in air transportation, between the islands of Kauai, Oahu, Molokai, Lanai, Maui and Hawaii, of the State of Hawaii or between any combination of said islands,"without first being issued a certificate of public convenience and necessity by"the Civil Aeronautics Board (235 F.Supp. at p.1010) This Court affirmed.

While its appeal from the District Court injunction was pending, Island filed with the Board its application for an exemption from the certificate requirements of Section 401, as well as from all other economic regulatory requirements imposed by the Act. (R. 1) The application, filed pursuant to Section 416(b), alleged (1) that the need for adequate interisland service is especially great for local resident because of the geographical peculiarities of the State; (2) that existing interisland carriers primarily serve tourists traveling as part of a through journey from the mainland to the outer islands, and as a result the fare level is so high that their service places a damper on local traffic; (3) that this is primarily a local transportation problem and should be under the regulatory control of the local government; (4) tha

the Board does not have jurisdiction over intrastate transportation generally and that its jurisdiction here is based on a technicality; and (5) that there is no significant federal function to be served by continued federal regulation.

Hawaiian (R. 38) and Aloha (R. 143) filed answers in opposition to Island's application, including statistical data with respect to interisland traffic, operating costs, fares, service, and estimates of the effect of third carrier competition. In general, it was their position that the market is too small to support three carriers; that an additional carrier or carriers in the market would substantially increase their subsidy requirements or fares or both; that existing service is adequate and is provided at reasonable fares; and that Island had failed to submit any facts to support the findings required by Section 416(b).

Island filed no reply to these answers nor did it request a hearing. Upon consideration of Island's application and the answers thereto, the Board found that Island had "not made a sufficient showing to warrant a grant of the exemption authority requested" (R. 168). It found nothing in Island's application to support Island's contention that a certificate proceeding would be an undue burden on that carrier or other carriers which might be authorized by the State of Hawaii to provide interisland air service, and no basis for concluding that enforcement of the economic regulatory requirements of the Act would not be in the public interest. Island, the Board said, had presented no facts indicating that existing service was inadequate; no details on

the size of the existing or potential market; and no facts as to why Island or any other carrier was better equipped than Hawaiian or Aloha to provide service designed for the resident market. Moreover, the Board continued, the operations of Hawaiian and Aloha required substantial federal subsidy assistance. Estimates submitted by these carriers indicated that Island's proposed service would result in diversion of up to $4.8 million annually, thereby substantially increasing their subsidy need. Under these circumstances, the Board found that "it would not be in the public interest to grant exemption authority permitting a carrier or carriers to operate in direct competition with Hawaiian and Aloha." (R. 168). Finally, the Board rejected Island's contention that federal jurisdiction rested upon a mere technicality. It found that Congress had fully considered this question and had deliberately determined that federal regulation of interisland air transportation should continue. (R. 169).

Island did not petition for rehearing, and filed its petition for review herein on November 23, 1965.

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the appendix to this brief, infra, p.29 et seq.

ARGUMENT

I. The petition for review presents no substantial issue which is open for consideration

In the final analysis, the basic thrust of Island's entire case is that interisland air carriage is not, or should not be, subject to

federal control and hence that the Court should direct the Board to issue an order relinquishing such jurisdiction in favor of the local authorities.[6/] While couched in terms of an abuse of administrative discretion, Island's contentions--with the exception of an allegation of procedural error--are the same ones advanced by Island and rejected by the District Court and this Court in the injunction case. It argues that interisland air carriage is "intrastate in every substantial sense" (Br. p. 10) and hence a matter of local concern; that assertion of federal jurisdiction over such carriage results in "suffocation . . . of a state power which the state needs for its well being and which all other states possess" (Br. p. 16); that "'unusual circumstances' are abundantly present in the geography of Hawaii and its constitutional consequences", which cause a certification proceeding under Section 401 to be "an undue burden" within the meaning of Section 416 "because the Act does not cover the service described" (Br. p. 22); and that federal regulation of interisland air carriage unconstitutionally deprives the State of Hawaii of "equal footing" in the federal union (Br. pp. 29-33).

All of the foregoing arguments, and the variations on them which appear repeatedly throughout Island's brief, have been considered and rejected by this court within the past six months. It was determined

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6/ Obviously the Court cannot direct the Board to exercise its discretion in a certain way. See Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952); Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); State Airlines v. Civil Aeronautics Board, 174 F.2d 510 (C.A.D.C. 1949) reversed on other grounds, 338 U.S. 572 (1950).

in the injunction proceeding that interisland operations are not a matter of purely local concern because of their impact upon the two federally certificated carriers and hence upon the U.S. Treasury; that such operations do come within the coverage of the Federal Aviation Act; that this result was specifically intended by Congress; that Congress had the power to subject them to federal regulation; and that assertion of such power does not deprive the State of Hawaii of equal footing.

In sum, the parties in the instant proceeding are identical to those in the injunction litigation; the substantive issues are the same; and there has been neither change in the dispositive facts nor any intervening legal development. In these circumstances, we submit, the issues are res judicata (Sunshine Coal Co. v. Adkins, 310 U.S. 381, 401-404 (1940)) or else not open to consideration under the principle of collateral estoppel (Commissioner v. Sunnen, 333 U.S. 591, 597-603 (1948)). As a practical matter, however, it is unnecessary for the Court to determine whether the various technical requirements of res judicata or collateral estoppel are presented. It should be enough to know that no showing has been made which would warrant this Court's reconsidering issues which it considered less than six months ago and which it decided adversely to Island. Cf. Great Lakes Airlines v. Civil Aeronautics Board, 293 F.2d 153 (C.A.D.C. 1961).[7/]

7/ We do not mean, of course, that the decision in the injunction case would foreclose grant of an exemption with respect to a given interisland operation if the Board could make the findings required by the Act. Our point is simply that the basic allegations of error presently advanced with respect to the Board's denial of exemption in this case

Island's contention that the Board erred in failing to hold a hearing on its application is plainly barred from consideration by the Court, though for a different reason. As previously indicated, Island filed no reply controverting the allegations set forth in the answers of Hawaiian and Aloha to its application, it never requested a hearing, and did not seek reconsideration of the Board's order. 8/ The carrier's failure to request a hearing and the complete absence of any showing of cause, let alone good cause, for such failure forecloses consideration of its contention that the Board should have ordered one sua sponte.

Section 1006(e) of the Act (49 U.S.C. 1486(e), infra, p. 32) provides that "no objection to an order of the Board . . . shall be considered by the court unless such objection shall have been urged before the Board . . . or, if it was not so urged, unless there were reasonable grounds for failure to do so." Not only must objection be raised, but it must be raised in a timely manner. As the Supreme Court said in United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952):

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . .. Simple fairness to those who are engaged in the tasks of administration,

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8/ The Board's Rules of Practice provide that an applicant for exemption may file a reply to an answer opposing his application (14 C.F.R. 302.407). They also provide that the applicant may request a hearing on his application (14 C.F.R. 302.408). While the Rules of Practice do not specifically provide for petitions for reconsideration of orders denying exemption, they are frequently filed and entertained.

and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

A similar situation was involved in Seaboard and Western Airlines v. Civil Aeronautics Board, 183 F.2d 975 (C.A.D.C., 1950), the only case in the Board's history, up until now, in which denial of an exemption has been the subject of a petition for judicial review The Court's treatment of it is dispositive of Island's procedural objection:

> "The present petition asks review of the Board's order denying a temporary exemption. The point to which petitioner's brief and argument are directed is that the Board failed to make adequate findings. Petitioner did not urge this objection before the Board, despite the fact that petitioner asked the Board for a rehearing on other grounds. The objection therefore comes too late. The statute provides that 'No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.' 52 Stat. 1024, 49 U.S.C. §646(e). No such grounds are shown. It follows that we could not modify or set aside the Board's order even if we regarded the objection now urged as valid."

II. The Board's denial of exemption from the Act was a reasonable exercise of administrative discretion

A. The exemption power generally and in relation to the Hawaiian statehood legislation

Island argues that the Federal Aviation Act contemplates a "program of exemption" in addition to certification and other economic regulation (Br. p 9), and that the Board erred in failing to establish such a "program" under which regulation of interisland air carriage would be left to local authority. The contention is at war with the Federal Aviation Act and the Hawaiian statehood legislation.

As Judge Prettyman has observed, the certification and exemption provisions are not "merely two alternative methods by which the Board

can authorize operation". American Airlines v. Civil Aeronautics Board, 231 F.2d 483, 488 (C.A.D.C. 1956). On the contrary, "[t]he basic concept of the statute . . . is . . . a certificated system. American Airlines v. Civil Aeronautics Board, 235 F.2d 845, 850 (C.A.D.C. 1956) cert. denied, 353 U.S. 905. 9/ In other words, certification is the "normal" method for authorizing those significant services which Congress has chosen to subject to the Act. Pan American World Airways v. Civil Aeronautics Board, 261 F.2d 754, (C.A.D.C. 1958), cert. denied, 359 U.S. 912. Thus, Island completely misconceives the nature and scope of Section 416(b) and its place in the statutory scheme established by the Federal Aviation Act. Its contention is, in effect, precisely the one rejected by the court in American Airlines, supra, 235 F.2d at p. 850.

> ". . . Congress did not intend that the Board might, by the use of the exemption provisions of Section 416(b), destroy the elaborate basic requirements of the Act for a certificated

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9/ This case eventually led to legislation (P.L. 87-528, 87th Cong. 2d Sess., 76 Stat. 143) during the consideration of which Congress expressed views as to the exemption power which are wholly at odds with Island's concept of the power. As the court's opinion reveals, the Board had granted exemptions to a number of carriers to engage in "supplemental air transportation". The court reversed, holding the exemptions invalid. Thereafter, the Board issued certificates of public convenience and necessity authorizing the same service and this action was held by the court to be in excess of the Board's statutory authority. (United Airlines v. Civil Aeronautics Board, 279 F.2d 446 (C.A.D.C. 1960)). As a result, legislation was introduced to amend the Act so as to empower the Board to issue certificates for such service. The history of that legislation reflects complete agreement with the court in reversing the exemption order. Thus, the Conference Committee reported that "the hearing records of both Houses are replete with evidence that the Board has exceeded the proper use of the exemption authority . . . ." It added that the exemption power under Section 416 "should be construed narrowly and employed in only very limited and unusual circumstances." (H.R. Rep. No. 1950, 87th Cong., 2d Sess., p. 13).

> system of airplane carriage . . .. Despite the broad language of Section 416(b), we think it perfectly clear that Congress did not set up so elaborate a series of provisions in respect to the certification of carriers, and the public interest, convenience and necessity therein involved, and at the same time grant its administrative agency power to destroy those elaborate provisions."

In short, "the Board . . . may not unduly impinge upon the certificated system by use of the exemption power" (235 F.2d at p. 850).

To be sure, the Board has promulgated various so-called blanket exemption regulations permitting various types of carriers to operate without obtaining certificates of convenience and necessity and, in varying degrees, without compliance with other regulatory provisions. Examples include the present air taxi regulation (14 C.F.R. 298) under which operators of small aircraft may engage in air transportation throughout the United States, including Hawaii. 10/ The Board also at one time permitted various irregular and specialized services with large aircraft pursuant to a blanket exemption. See 14 C.F.R. 291 (1949 Ed.), 14 F.R. 3546, 6807; 14 C.F.R. 295 (1949 Ed.), 14 F.R. 3552.

However, in all of these situations the operations were deemed to be such as not to "unduly impinge upon the certificated system." Here, Island seeks not only an exemption under which the Board would surrender its authority to the state, but one which contemplates the use of large transport aircraft in direct competition with the certificated and subsidized operations of Aloha and Hawaiian. Plainly, the Board was not required to accede to this request.

10/ See 14 C.F.R. 298.2, 298.21(b) and (e).

The notion that there should (indeed, according to Island, must) be a "program of exemption" with respect to interisland operations also flies in the face of the legislative history of the statehood legislation. The Board was plainly right in stating in its order denying exemption (R. 168) that "the Congress of the United States in enacting the Hawaii Statehood Bill . . . fully considered the regulatory problem and determined that because of the geographic situation, federal regulation of the interisland air transportation should continue." As the District Court observed in the injunction proceeding, the legislative history of the Statehood Bill reflects a clear Congressional intent "that interisland flights . . . were expected to fall within the scope and control of the Act", and that these operations "are not of purely local interest and concern" (235 F.Supp. at p. 1010).[11/] This Court agreed, pointing out that "'the Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field, it has supremacy.'"[12/] In

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11/ In reporting on the Statehood Bill, the Senate Committee stated as follows: "In the other States, air transportation of this kind passing through airspace outside the State is of slight volume in comparison with air transportation merely between places in the same State. In the case of Hawaii, the reverse would be true. The committee wishes to make it clear that it believes the application of the provisions of the Federal Aviation Act and other applicable Federal legislation to the State of Hawaii should continue in accordance with the definition of interstate air transportation as contained in that act." S. Rep. No. 80, 86th Cong., 1st Sess. (emphasis added). See, also, Hearings, Senate Committee on Interior and Insular Affairs, on S. 50, 86th Cong., 1st Sess., relevant excerpts from which are quoted at pages 18-20 of the Board's brief in this Court in Island Airlines v. Civil Aeronautics Board, No. 19,752.

12/ Quoting United Airlines v. Public Utilities Comm'n, 109 F.Supp. 13 (N.D. Cal. 1952), reversed on other grounds, 346 U.S. 402 (1953).

short, it is settled that Congress specifically focused on the question and deliberately determined that interisland air transportation should remain subject to federal jurisdiction and control.

In the light of the foregoing, it is obvious that acceptance of Island's theory would completely nullify the Congressional intent in specifically subjecting interisland operations to the certification and other regulatory requirements of the Act. Congress was fully aware of the considerations advanced by Island in support of the view that the federal interest in such operations is slight, and therefore that federal jurisdiction should be forsaken. It nevertheless determined to preserve federal regulation. It simply makes no sense to argue that, while deliberately preserving federal regulation over interisland operations, Congress at the same time contemplated establishment of a "program of exemption" under Section 416(b) under which the Board would totally dispense with federal regulation.

B. Island's application and the Board's findings with respect to it

The showing which an applicant for exemption must make is set forth in Section 416(b) itself. There must be a showing upon which the Board can predicate a finding that enforcement of the provisions of the Act from which exemption is sought would be "an undue burden" on the applicant because its "operations" are either of "limited extent" or affected by "unusual circumstances". In addition, the Board must be able to find that enforcement of the Act "is not in the public interest". The Court of Appeals of the District of Columbia Circuit

has held that, "in the absence of any one of these findings, the Board is not authorized to suspend the normal statutory requirements of notice, hearing and requisite findings for issuance of a certificate of public convenience and necessity."[13/]

It would be impossible (and, for purposes of this appeal, pointless) to catalog here all of the types of situations in which the Board has determined that an exemption from the certificate requirements of the Act (i.e., permitting new service) is justified. Among the factors considered by the Board in determining that an exemption is warranted have been (1) the existence of an immediate and unfulfilled public need for service of such urgency that a certificate proceeding would unduly delay fulfillment of the need;[14/] (2) the temporary or sporadic character of the service;[15/] (3) the experimental character of the service;[16/] or (4) because of rapidly changing demands, the need for flexibility in performance of the service, a need which would be hampered by repeated certificate amendment proceedings.[17/] Moreover,

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13/ Pan American World Airways v. Civil Aeronautics Board (supra, 261 F.2d at 757).

14/ E.g. Mackey Airlines, Exemption, 26 C.A.B. 709 (1957); Mohawk Air. Ogdenburg, Exemption, 25 C.A.B. 766 (1957).

15/ United Air Lines, Exemption, 25 C.A.B. 782 (1957); Lake Central, North Central, St. Joseph/Benton Harbor, Exemption, 30 C.A.B. 1542, (1959); Application of Starflite, Inc., Order E-21535 (1964).

16/ Surface-Mail-By-Air, Exemption, 20 C.A.B. 658 (1955); affirmed, American Airlines, et al. v. Civil Aeronautics Board, supra, 231 F.2d 483.

17/ Los Angeles Airways, Certificate Renewal, 14 C.A.B. 284, 288 (1951); Service to Santa Catalina Island, 30 C.A.B. 1060, 1077 (1960).

as the cases cited disclose, the Board customarily takes into consideration the competitive impact which the proposed service would have upon existing carriers operating pursuant to certificates of public convenie and necessity. Island's application presented no facts or supporting d remotely suggesting the existence of such factors.[18/] Rather, it sough complete relinquishment of federal control so that it, and all other carriers similarly situated, might engage in a regular, scheduled servi on, so far as the Federal Government would be concerned, a permanent basis. With the exception of extended argument with respect to the alleged lack of federal interest in interisland transportation, and "policy" favoring local regulation of local commerce (R.20), its application rested upon the bald assertion, wholly unsupported by any factual detail, that there exists a need for interisland service in addition to that being provided by Hawaiian and Aloha. As the Board said:

> "Island has not presented any facts which would indicate that existing service is inadequate to meet the air service needs of Hawaiian residents. The application does not contain any details on the size of the existing or potential market, nor does Island submit any facts on why it or any other carrier might be better equipped than Hawaiian and Aloha to provide service designed for the resident market" (R. 168).

18/ The Board's procedural regulations require that exemption applications "shall state in detail the facts relied upon to establish that the enforcement of the provisions from which an exemption is sought is or would be an undue burden upon the applicant by reason of the limited extent of, or unusual circumstances affecting the operations of such applicant and that enforcement of such provision is not in the public interest." (14 C.F.R. 302.402(b)). They also require that the application "be accompanied by a statement of economic data or other matters which the applicant desires the Board to officially notice, and by affidavits establishing such other facts as the applicant desires the Board to rely upon." (14 C.F.R. 302.402(c)).

In other words, apart from its "federal-state policy" arguments, Island alleged only, and in conclusory form at that, that more interisland service was required by the public convenience and necessity. This is, of course, precisely the purpose of the certificate provisions of the Act. Thus, Island's showing left the Board little, if any, alternative but to find that the carrier had made "no showing that exemption of Island and all other carriers authorized by the Hawaiian State Government to provide interisland air service would be in the public interest, nor that a certificate proceeding would be an undue burden on Island or such other carriers" (R. 168).[19/]

Not only had Island failed to make any factual showing upon which the Board could predicate the findings required by Section 416(b) as a prerequisite to exemption, but the Board found affirmatively that an exemption would be contrary to the public interest (R. 168):

> "In addition, the Federal Government has a substantial interest in the problems of interisland air transportation, which could be adversely affected by the exemption requested. Since 1949 it has paid $6,377,000 in subsidy to the two interisland carriers. Aloha estimates that Island's proposed service

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19/ Even in its brief here, Island completely ignores the lack of any showing in these respects. It argues only that "'unusual circumstances' are abundantly present in the geography of Hawaii and its constitutional consequences" and that these circumstances cause an "undue burden" within the meaning of Section 416(b) (Br. p. 22). The undue burden is asserted to be that "a certification proceeding . . . [would be] foredoomed because the Act does not cover the service described . . .. If the service is not within the Board's authority to certify, it is not within the Board's authority to exclude, and any obligatory proceeding to invoke Board action beyond its powers would be an undue burden" (ibid.). In view of the decision of the District Court and this Court in the injunction proceeding, these assertions are without merit. The specific holding there was, of course, that, notwithstanding the "unusual circumstances" now relied upon by Island, the Act does cover the service described, and hence is within the Board's regulatory authority.

would divert $1,000,000 annual revenue from Aloha, and Hawaiian estimates that the two subsidized carriers would lose an additional $4,856,000 annually as a result of Island's service. These diversion estimates are based on Island's service alone, while the application presents the possibility of an even greater number of additional carriers in the market. Under these circumstances, it would not be in the public interest to grant exemption authority permitting a carrier or carriers to operate in direct competition with Aloha and Hawaiian."

Contrary to Island's contentions, the relevance of these considerations is obvious. Section 102 of the Act (49 U.S.C. 1302, infra, p. 29 directs the Board to consider a number of factors "as being in the publi interest". Among these are the development of an economically sound air transportation system, properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense Hawaiian and Aloha, both operating pursuant to certificates issued by the Board, are a part of the national air transportation system Thus, diversionary impact of competitive services upo them is manifestly relevant to the preservation of sound economic conditions in the system Moreover, where, as in the case of Hawaiian and Aloha, the service is subsidized, the effect of revenue diversion upon the Federal Treasury necessarily looms large in determining wherein lies the public interest Thus, from the earliest days, the Board has taken these factors into consideration in determining whether competitive services should be authorized, both in certificate proceedings and in passing upon exemption applications.[20/] Further, in American Airlines v. Civil

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20/ In addition to the various exemption cases cited, supra, p. 17 fn., e.g., Mid-Cont. Air., Twin Cities-St. Louis Operation, 2 C.A.B. 63, 93 (1940); Florida Case, 6 C.A.B 765, 774 (1946); Hawaiian Intraterritorial Service, 10 C.A B. 62, 65-66 (1948).

Aeronautics Board, supra, 235 F.2d at p. 851, the Court emphasized the importance of the impact upon certificated carriers as a factor to be considered by the Board in granting exemptions. 21/ Moreover, in the injunction proceeding it was specifically held that the potential diversion of traffic from Aloha and Hawaiian and the resultant increase in the claims of those carriers for subsidy support were precisely the reasons that Island's interisland flights are a matter of federal concern (235 F.Supp. at p. 1010). In these circumstances, we submit, the Board's findings with respect to the potential impact upon Aloha and Hawaiian were obviously relevant to, and supported, the Board's determination that relinquishment of federal jurisdiction over competing carriers would not be in the public interest. 22/

21/ In agreeing with the Board's determination in that case that the service in question was in the public interest, the Court did so upon acceptance of the Board's finding that the "proposed supplemental service will not result in adverse economic effects upon the certificated system", and "the assurance of the Board that it will not hereafter permit adverse economic effects to jeopardize the certificated system or to pose a substantial threat to it." (235 F.2d at p. 851). The Court stated that "this is required by the general scheme of the statute" (235 F.2d at p. 850).

22/ Island asserts in this connection that neither Aloha nor Hawaiian "has proved, under the conditions of Hawaiian Statehood, a case of public convenience and necessity", and that the Board has "covered [them] with an impenetrable blanket of competitive immunity on grounds of an earlier public interest which the CAB has never reviewed since the change in Hawaii's status and which now is exclusively Hawaii's function to determine" (Br. p. 21). By "conditions of Hawaiian Statehood", we assume Island means the alleged lack of federal interest in interisland air carriage, a contention laid to rest in the injunction proceeding. Similarly laid to rest was the contention that it is now "exclusively Hawaii's function to determine" the public interest factors involved in interisland air carriage.

(footnote continued)

Island suggests that the Board's finding of potential impact of additional interisland service upon Hawaiian and Aloha is undercut by a study prepared by the Board's staff relating to air travel between Los Angeles and San Francisco (Appendix B to Island's Brief).[23] This study, which does "not necessarily reflect official views or opinions of the Board Members themselves", is designed "to throw light on the factors generating air passenger traffic" (Br. p. 9a). It in no way detracts from the Board's judgment.

It is true that Hawaiian's basic authority is a "grandfather" certificate This authority, however, has been amended under the public convenience and necessity standard and, moreover, Aloha's certificate was issued only after proof of public convenience and necessity. Statehood has no effect on the proof or findings required under that standard. The Board normally considers the needs of intrastate travelers in certificate proceedings. See, e.g , Frontier Airlines v. Nebraska Department of Aeronautics, 175 Neb. 524, 122 N.W. 2d 476 (1963); Southwestern Area Local Service Case, 30 C.A.B. 1318, 1326-1332 (1959).

To the extent that Island may be suggesting that the Board should decertificate Aloha and/or Hawaiian, we merely note that Section 401(g) (49 U.S.C. 1371(g)) authorizes revocation of a certificate only for intentional violations of the Act.

23/ We note Island's reference (Br. p. 36, n. 26) to the fact that one of the carriers providing service between Los Angeles and San Francisco is Pacific Southwest Airlines, the intrastate carrier involved in C.A.B. Friedkin Aeronautics, 246 F.2d 173 (1957), in which this Court held that operation physically confined within the boundaries of a single state might nevertheless be interstate air transportation for which authority from the Board is required. While it is of no particular moment, Island is mistaken in asserting that the Board has not, since that case, had occasion to proceed against PSA for violations of the Federal Aviation Act. On June 10, 1963, the Board issued a cease and desist order (E-196 restraining the carrier from carrying on its intra-California flights a substantial number of persons whose journeys commenced or terminated at points outside of California.

It is self-evident (and the staff study bears this out) that a new service will normally divert revenues from existing carriers.[24] To be sure, competition sometimes results in traffic growth. As the study itself points out, however, "historical [traffic] change is [a] compound of many factors" (Br. p. 9a). It by no means follows, moreover, that an increase in the amount of traffic will offset the diversion from existing carriers. Whether there will be traffic growth and whether it will offset the diversionary impact upon existing carriers depends upon such factors as the existing size and potential of the market, the pattern of service offered, and the like. Island presented no facts upon which an estimate could be made in this regard.[25] Moreover, as the Board emphasized, Island's proposal was for wholesale competition by an unlimited number of carriers. In these circumstances, we submit, there is no basis for Island's complaint that the Board's judgment with respect to the impact upon Hawaiian and Aloha of relinquishment of all federal control over competition with these carriers.

As previously indicated, with the exception of the alleged need for additional interisland service, Island's entire case for exemption rested upon constitutional policy arguments that such transportation should not

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24/ Indeed, in the injunction proceeding, the District Court "accept[ed] the government's statement that there would be a very substantial decrease in revenues to the two carriers (estimated at well over $3,000,000 annually)", and that "any substantial loss of revenue would materially increase the claims of the two carriers for subsidy support" (305 F.Supp. at p. 1009).

25/ It did not even rely on staff study in its presentation to the Board. Moreover, a study of "the heaviest traveled of all city-pair markets in the world" would have little materiality on the ability of interisland markets to support multiple competition.

be subjected to federal regulation, and it contends that "the Board . . committed flagrant error in refusing even passing notice of the state's contention that the public interest called for preservation of local power over local commerce" (Br. p. 16). The Board specifically dealt with this question, finding that it had been disposed of by Congress itself (R. 168-169). We have already shown that the Board was clearly right It will suffice to repeat at this point what has already been demonstrated, namely, that Congress was fully aware of the consideration advanced by Island, and nevertheless deliberately chose to subject inter island transportation to federal regulation, a decision which this Court specifically held to be within Congress' constitutional power.[26/]

Contrary to Island's contention (Br. pp. 25-27), the Board's decisi in this case is not inconsistent with Catalina Island Service Investigation, Order E-19678 (1963) or Application of Starflite, Inc., Order E-21535 (1964) As Island frankly conceded before the Board, the Catalina Island case was not based upon the "intrastate quality of the

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26/ Island's argument (Br pp 29-33) that application of the Act is an unconstitutional violation of the "equal footing" doctrine (Coyle v Smith, 221 U S. 559 (1911)) was specifically raised and rejected in the injunction proceeding. The Court there stated (352 F.2d at p. 744) that "we find no 'invidious discrimination' against the State of Hawaii 'Equal boundaries to each state are not necessary'. United States v. Louisiana, 363 U.S. 1, 77 (1960)" In the case cited by the Court, the Supreme Court specifically rejected an "equal footing" contention.

While the "equal footing" contention is foreclosed by the decision in the injunction case, a word is in order with respect to Interior Airways v. Wien Alaska Airlines, 188 F.Supp. 107 (D.C. Alaska 1960) cited by Island (Br. pp. 30-31). The critical distinction between that case and this one is that the transportation there involved was not "interstate" within the meaning of the Act, whereas interisland transportation i

service authorized . . . and the two situations are not wholly parallel" (R. 24). Similarly, in Starflite the Board's decision was not predicated upon the view that the operations were of local concern and hence should be left to local regulation. Moreover, the operations exempted involved only occasional passage through the airspace of a place outside of the state because of weather conditions, and there was no problem of competitive impact upon other carriers.[27/]

III. There was no irregularity in the Board's procedure

As previously indicated, despite the existence of regulations permitting it to do so, Island filed no reply to Hawaiian's and Aloha's answers to its application, nor did it request a hearing. Apart from the fact that the carrier's failure to request a hearing forecloses consideration of its contention here that a hearing should have been held, such failure is a fair measure of the merits of the contention.

Numerous provisions of the Act--including Section 401(c) which governs proceedings on applications for certificates of public convenience and necessity and which is the basic provision from which Island sought exemption--require a hearing prior to Board action. In

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27/ Island's reliance on Motor Carrier Operation in the State of Hawaii, 84 M.C.C. 5 (1960) is misplaced. There, a closely divided Commission, acting pursuant to a statutory provision specifically empowering the Commission to determine whether interstate and foreign commerce was of sufficiently insubstantial federal interest to warrant exemption from federal regulation in favor of local regulation, found "no useful purpose" in federal regulation. Here Congress affirmatively determined for itself that interisland air carriage should remain subject to federal regulation, and it has been judicially determined that there is a substantial federal interest in such regulation.

marked contrast, Section 416(b) does not and it has been uniformly held that none is required. Eastern Air Lines v. Civil Aeronautics Board, 185 F 2d 426 (C.A.D.C. 1950), vacated as moot, 341 U.S. 901; Cook Cleland Catalina Airways v. Civil Aeronautics Board, 195 F.2d 206 (C.A.D.C. 1952); American Airlines v. Civil Aeronautics Board, supra, 231 F.2d 483.[28] As the court observed in Eastern, "[t]here would be small point in permitting the Board to exempt a carrier from the delay and other burdens of a full hearing under §401(h) and at the same time requiring the Board, before granting the exemption, to hold a similar full hearing under §416(b)(1)" (185 F.2d at 428).

In an effort to avoid the dispositive effect of these decisions, Island suggests that the Eastern case turned upon the fact that "there were proceedings, in the course of which several verified documents were filed with the Board" (185 F.2d at 428), and that "no such proceedings were had before the Board in Island" (Br. p. 36). The "proceedings" involved in Eastern were precisely the same as those involved here with the possible exception that the documents filed in this case--including Island's--were not verified. Obviously, the Court's decision in Eastern did not turn upon this factor, and it may be added that the Court there held "that these proceedings were all the law requires and more" (185 F.2d at p. 428).[29]

28/ Cf. Springfield Airport Authority v. Civil Aeronautics Board, 285 F.2d 277 (C.A.D C., 1960); Nebraska Dept. of Aeronautics v. Civil Aeronautics Board, 298 F.2d 286 (C.A. 8, 1962).

29/ As Island itself recognizes, any contention that the rule established in Eastern is applicable only to competitors objecting to the grant of an exemption is foreclosed by Cook Cleland.

Island also suggests that Cook Cleland turned upon the fact that the Board treated as true all of the applicant's allegations of fact, and that, in contrast, the Board rejected Island's factual allegations, "accepted facts alleged but not proved by the opposition, and made such unproved facts the basis of decision" (Br. p. 37).[30] The carrier is wrong on all counts. The Court held in Cook Cleland that "exactly the same reasoning" adopted in Eastern applied there, and in Eastern there were sharply contested factual issues. Moreover, the facts alleged by Hawaiian and Aloha in opposition to grant of Island's application were never contested by Island, notwithstanding that it had ample opportunity to do so. Thus, to the extent that those facts entered into the Board's decision, Island has no basis for complaint.[31]

Finally, we note Island's suggestion (Br. p. 37) "that a sound statement of current law on the right to a hearing at the administrative level in the absence of statutory provision therefor is found in the

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30/ Apparently Island would perceive no error if the Board had accepted the "facts alleged but not proved" in its own application.

31/ Even now, Island does not indicate what purpose a hearing would serve, save to call to the Board's attention the staff study relating to the Los Angeles/San Francisco market (see, supra, p. 22). As previously indicated, this study would have little, if any, materiality to the impact upon Hawaiian and Aloha of competition by Island and other carriers. Moreover, Island was free to call this to the Board's attention prior to the Board's decision and failed to do so. To be sure, the study was published subsequent to the time called for by the Board's Rules of Practice for a reply to the answers of Hawaiian and Aloha. However, the Rules specifically provide that leave to file otherwise unauthorized documents may be obtained for good cause shown (14 C.F.R. 302.4(f)) and discovery of "new evidence" not theretofore available is often treated as good cause.

Court's opinion in First Nat. Bank of Smithfield, N.C. v. First Nat. Ban of E.N C , 232 F Supp. 725 (E.D.N.C., 1964)." The short answer is that that case has been reversed on the precise point for which Island cites it (First Nat'l Bank of Smithfield, North Carolina v. Saxon, 352 F.2d 26 (C.A. 4, 1965)), and the "current law" on the subject remains Eastern, Cook Cleland, and American.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

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Dated: March, 1966

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 et seq., are:

TITLE I - GENERAL PROVISIONS

DEFINITIONS

Sec. 101 [72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires--

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

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(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively--

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

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DECLARATION OF POLICY: THE BOARD

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall

consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

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TITLE IV--AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

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RATES FOR TRANSPORTATION OF MAIL

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Sec. 406. [72 Stat. 763, as amended by 76 Stat. 145, 49 U.S.C. 1376]

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Rate Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

Sec. 416. [72 Stat. 771, 49 U.S.C. 1386] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

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TITLE X--PROCEDURE

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JUDICIAL REVIEW OF ORDERS

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Sec 1006. [72 Stat. 795, 49 U.S.C. 1486]

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Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

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